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In The

Supreme Court of the United States

October Term, 1996

COUNTY OF SACRAMENTO, SACRAMENTO COUNTY SHERIFF'S DEPARTMENT, AND JAMES EVERETT SMITH,

Petitioners,

v.

TERI LEWIS AND THOMAS LEWIS, personal representative of estate of Phillip Lewis,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICUS CURIAE* CITY AND COUNTY OF DENVER, COLORADO, IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* CITY AND COUNTY OF DENVER, COLORADO, IN SUPPORT OF PETITIONERS

Amicus curiae City and County of Denver, Colorado, supports the petitioners in this action.

For purposes of the issues raised in the instant brief, the material facts are as follows: Deputy Smith was entitled to attempt a lawful stop of suspects fleeing on a motorcycle and intended to accomplish this by pursuing and overtaking the motorcycle. Instead, an accident occurred as a result of the excessive speed of the pursuing patrol unit when it could not avoid hitting and thereby killing the passenger of the motorcycle (Mr. Lewis) after the motorcycle had skidded to a halt. *See Lewis v. Sacramento County*, 98 F.3d 434, 437 (9th Cir. 1996). It is further undisputed that the pursuing officer did not intend to collide with the passenger, but only to apprehend him, and that the police vehicle was not being used as an instrument of force in the apprehension. The passenger's estate brought suit under 42 U.S.C. § 1983 alleging a Fourteenth Amendment deprivation.

I. SUMMARY OF ARGUMENT

Automobile accidents do not implicate the Constitution whether the claim is submitted under the Fourth Amendment or under the Fourteenth Amendment. Furthermore, *amicus* Denver submits that this Court should not extend the protections of the Due Process Clause to accidental death such as is found in this case because this type of injury is not contemplated under the Fourteenth Amendment and is traditionally reserved for recovery

under state tort law. Finally, if this Court recognizes a constitutional implication arising from these facts, it should hold that the standard of conduct which violates the Fourteenth Amendment under these facts is conduct which shocks the conscience.

II. ARGUMENT

1. Accidents Do Not Implicate the Constitution

Because Mr. Lewis was seized, this case at least on its face implicates the Fourth Amendment. Additionally, the Fourteenth Amendment's prohibition on deprivation of life without substantive due process, also, at least on its face, may apply to the facts herein. Indeed, it is in this context that the Ninth Circuit, the parties, and other *amici* analyze the case. Because resolving the issue of whether accidents come within the reach of the Constitution is germane to either Fourth Amendment or Fourteenth Amendment analysis, both Amendments are analyzed below in the context of whether accidental injury invokes either Amendment.

"The first step in any [§ 1983] claim is to identify the specific constitutional right allegedly infringed." *See Albright v. Oliver*, 510 U.S. 266, 271 (1994), citing *Graham v. Connor*, 490 U.S. 386, 394 (1989); and *Baker v. McCollan*, 443 U.S. 137, 140 (1979). As in *Albright*, the Amendment upon which the courts below have focused was the Fourteenth Amendment. However, in *Albright*, this Court initially focused on the Fourth Amendment. Similarly, the Fourth Amendment should be this Court's initial focus in the instant case.

a. There was no Fourth Amendment violation

Deputy Smith clearly intended to apprehend Mr. Lewis and his driver. As this Court stated in *Graham v. Connor*, 490 U.S. at 395, seizures are analyzed under the Fourth Amendment, not under the substantive prong of the Due Process Clause. Thus, the first question is whether the injury was the result of "a governmental termination of freedom of movement *through means intentionally applied*" which implicates the Fourth Amendment. *See Brower v. Inyo County*, 489 U.S. 593, 597 (1989) (emphasis in original).

The instant case begins with the analysis first mapped in *Brower*. *Brower* addressed whether a road block implicated the Fourth Amendment. Ironically, this Court in *Brower* analogized the situation presented to it with "a police chase in which the suspect unexpectedly loses control of his car and crashes," *id.* at 595, *i.e.*, facts similar to those now before this Court, although the hypothetical accident in *Brower* did not involve the officer's car. This Court agreed that no seizure would occur in such a hypothetical (*id.*) because "the Fourth Amendment requires an intentional acquisition of physical control." *Id.* at 596. Obviously, because the hypothetical fleeing suspect had had an accident involving only himself, there was no acquisition of physical control and no Fourth Amendment implication.

On the other hand, this Court stated that a police chase could result in a Fourth Amendment seizure if "the police cruiser had pulled alongside the fleeing car and sideswiped it, producing the crash, then termination of the suspect's freedom of movement would have been a

seizure." *Id.* at 597. In other words, under circumstances where the police vehicle, itself, was intentionally used as an instrument of force in the apprehension, there may be Fourth Amendment implications. This second hypothetical situation results in "a governmentally caused and governmentally *desired* termination of an individual's freedom of movement (the fleeing felon), [because] . . . there is a governmental termination of freedom of movement *through means intentionally applied.*" *Id.* (emphasis in original).

The instant facts are different in one significant respect: while Deputy Smith did desire to terminate Mr. Lewis' freedom of movement, he did not intend to use his vehicle to strike Mr. Lewis to accomplish this purpose. Instead, Mr. Lewis was struck as a result of an accident, notwithstanding the fact that the accident would not have occurred had the officer not intended to apprehend the suspects by pursuit in the first instance.

This Court is now confronted with the issue, addressed in Justice Stevens' concurrence in *Brower*, in defining how "the concept of intent is useful in applying the Fourth Amendment." *Id.* at 601. On this point, this Court stated:

> In determining whether the means that terminates the freedom of movement is the very means that the government intended we cannot draw too fine a line, or we will be driven to saying that one is not seized who has been stopped by the *accidental* discharge of a gun[1]

[1] In this hypothetical, the officer intended to use the gun as a striking weapon, not as a weapon which fired a bullet. This factual scenario is distinguished from where the officer purposefully draws his weapon but accidentally discharges it. The lower courts are in agreement that such accidental firings are not seizures. *See infra.*, p. 6.

> with which he was meant only to be bludgeoned, or by a bullet in the heart that was meant only for the leg. We think it enough for a seizure that a person be stopped by the very instrumentality set in motion or put in place in order to achieve that result.

Id. at 598-99 (emphasis added). Thus, at least on first blush, the facts of the instant case come under the purview of a Fourth Amendment seizure as defined in *Brower* because Deputy Smith "set in motion" his police vehicle intending to seize Lewis, and Lewis was "stopped by the very instrumentality set in motion."

However, in the two examples cited in *Brower*, the officer put in motion an instrumentality which obtained the intended result, that is, the officer meant to use physical force against the first suspect (whom he meant to bludgeon) and meant to shoot the second suspect (in the leg). In the instant case, the officer also intended to seize the passenger, but he clearly did not intend to apprehend him by striking him with the police vehicle. The motor vehicle accident was an unintended consequence. While Mr. Lewis' estate claims that this nonetheless invokes the Constitution, this is incorrect because, as this Court stated in *Brower*, "the Fourth Amendment addresses 'misuse of power' [citation omitted], not the accidental effects of otherwise lawful government conduct." *Brower*, 489 U.S. at 596.

Thus, the instant case addresses the very same issue inherent in *Brower*, to wit, whether the injury sued upon is an "accidental effect of otherwise lawful government conduct," *id.*, which does not invoke the Constitution, or whether the injury is the result of "the very instrumentality set in motion or put in place to achieve the seizure," *id.* at 599, which does implicate the Constitution.

This case squarely presents to this Court the question of how far the Constitution will reach into areas traditionally reserved for the States, *i.e.*, into tort litigation. It is respectfully submitted that the instant case, because the injury results from an accident, does not invoke the Constitution.

The lower courts have applied this same analysis to Fourth Amendment claims. In a Fourth Amendment, accidental-shooting case, the Second Circuit has stated that "[i]t makes little sense to apply a standard of reasonableness to an accident." *See Dodd v. City of Norwich*, 827 F.2d 1, 2 (2nd Cir. 1987). The District Courts have also stated that accidental shootings do not invoke the Fourth Amendment "because the officers lacked intent to seize the victims by firing the guns." *See Clark v. Buchko*, 936 F.Supp. 212, 219 (D. N.J. 1996). *See also Troublefield v. City of Harrisburg*, 789 F.Supp. 160 (D. Pa. 1992), *aff'd*, 980 F.2d 724 (3d Cir. 1992); *Matthews v. City of Atlanta*, 699 F.Supp. 1552 (D. Ga. 1988); and *Glasco v. Ballard*, 768 F.Supp. 176 (D. Va. 1991).

Because this case involves a seizure, it should be analyzed under the Fourth Amendment; under the facts

of this case, the Fourth Amendment was not violated and the claim should be dismissed.

b. The Fourteenth Amendment is not implicated.

The respondent plaintiffs claim that the death of their son implicates the Fourteenth Amendment; however, the Fourteenth Amendment does not apply to the instant automobile accident because such an accident has been deemed to arise under traditional state tort law, not under the Constitution. The case herein is

> analogous to a fairly typical state-law tort claim: [the officer] breached his duty of care . . . by failing to [drive his car safely]. Because the Due Process Clause 'does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society' [citation omitted], we have previously rejected claims that the Due Process Clause should be interpreted to impose federal duties that are analogous to those traditionally imposed by state tort law.

Collins v. City of Harker Heights, 503 U.S. 115, 128 (1992), quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986), which continues as follows: "We have previously rejected reasoning that would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the states." (Interior quotations omitted.) The *Daniels* Court noted that the history of the Clause reflected that it was "intended to secure the individual from the arbitrary exercise of the powers of government," and "to prevent governmental power from being 'used for purposes of

oppression.' " *Id.* at 331. That history simply does not support a claim that the Fourth or Fourteenth Amendments extend to *accidental* deprivations of life.

In this context, the word "accident" is used in its traditional sense: a mishap, a mistake, an unintended result. This does not mean that the event was unforeseen because, in retrospect, many accidents are foreseeable. However, it is contrasted with the hypothetical this Court used in *Brower*, 489 U.S. at 599, when this Court stated that a Fourth Amendment seizure could arise where a police officer, who meant to bludgeon the suspect with a gun, accidentally shot the suspect. In that example, the officer meant to seize the suspect with force; however, in the instant example, the officer intended to seize the motorcycle and its occupants without using physical force to apprehend them.

Because this case involves an accident, it does not involve the arbitrary use of state power vis a vis the deceased. It merely concerns a violation of a rule of the road, *i.e.*, excessive speed or following too closely. Thus, because the case herein concerns "rules of conduct to regulate liability for injuries that attend living together in society," *see Collins*, 503 U.S. at 128, it does not invoke the protections of the Constitution.

The Seventh Circuit applied the same general reasoning in a police-chase case. *See Hill v. Shobe*, 93 F.3d 418, 421, fn. 2 (7th Cir. 1996), which disposed of a constitutional claim with the remark that "the key word is 'accident.' " *Hill* arose under facts somewhat similar to those presented herein where the officer was on an emergency

run and collided with a bystander.[2] The Seventh Circuit held that such cases did not invoke the Constitution unless the officer actually "intended" the accident: "motor vehicle accidents caused by public officials or employees do not rise to the threshold of a constitutional violation actionable under § 1983, absent a showing that the official knew an accident was imminent but consciously and culpably refused to prevent it." *Id.* at 420. This example is not an accident because the encounter could have been avoided but the officer intentionally chose not to avoid it.

This Court foresaw the problem in blurring the distinction between the Constitution and traditional torts years ago in *Paul v. Davis*, 424 U.S. 693, 698-99 (1976), when it warned against the very extension of the Constitution urged upon this Court:

> And since it is surely far more clear from the language of the Fourteenth Amendment that "life" is protected against state deprivation than it is that reputation is protected against state injury, it would be difficult to see why the survivors of an innocent bystander *mistakenly shot by a policeman* or *negligently killed by a sheriff driving a government vehicle*, would not have claims equally cognizable under § 1983 (emphasis added).

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[2] The obvious difference between the *Hill* facts and those before the Court is that in *Hill* the officer did not intend to restrict the freedom of movement of the bystander. Thus, *Hill* could arise only under the Fourteenth Amendment, not under the Fourth Amendment.

> It is hard to perceive any logical stopping place to such a line of reasoning. Respondent's construction would seem almost necessarily to result in every legally cognizable injury which may have been inflicted by a state official acting under "color of law" establishing a violation of the Fourteenth Amendment. We think it would come as a great surprise to those who drafted and sheparded the adoption of that Amendment to learn that it worked such result and a study of our decisions convinces us they do not support the construction urged by respondent.

The "logical stopping place" that this Court should draw for any constitutional claim is that line drawn between accidental injury and injury caused by intended state action. Although it may first appear that the requirement of intended state action is a difficult burden of proof, that is not at all the case. Indeed, it is difficult to imagine actionable state action which is not intended.

This is not to be confused with intentional conduct attended by unintended results. At no time did the officer intend to use his police vehicle as an instrumentality of force against the motorcycle driver or his passenger. Thus, it is a true accident. Indeed, but for the fact that the officer in the instant case generally intended to close the distance between himself and the suspects, there is nothing conceptually different between the accident herein and a hypothetical accident involving the officer as he was routinely patrolling his jurisdiction .and struck a pedestrian.

As stated above, the Fourteenth Amendment is not implicated herein because accidental injury is the grist of tort litigation, not of constitutional litigation. Nor will a

state actor's mere state of mind elevate a tort to constitutional implications. As this Court has stated previously, the reach of the Constitution should not be confused with what level of conduct (or state of mind) establishes a constitutional deprivation. The state actor's state of mind, no matter how egregious, does not hail constitutional protections to situations where the Constitution has no say: "[o]ur decision . . . did not turn, however, on the state of mind of the defendant, but on the lack of any constitutional protection. . . . " *Siegert v. Gilley*, 500 U.S. 226, 234 (1991). *See also Baker*, 443 U.S. at 140: "If there has been no such [constitutional] deprivation, the state of mind of the defendant is wholly immaterial."

Application of the substantive Due Process Clause to an automobile accident in the first instance is also unfounded because substantive due process has traditionally been applied only to personal relations:

> "As a general matter, the Court has always been reluctant to expand the concept of substantive due process because the guideposts for responsible decisonmaking in this unchartered area are scarce and open-ended." The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity.

See Albright v. Oliver, 510 U.S. 266, 271-72 (1994) (declining to extend the substantive Due Process Clause to a malicious prosecution-type claim). "The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break ground in this field," *i.e.*, the expansion of substantive due process protections. *Collins*, 503 U.S. at 125.

Given these twin considerations, (1) that the matter herein does not concern a traditional subject of the Due Process Clause and (2) that the matter herein is a traditional state tort, it is respectfully submitted that this Court should find that the Fourteenth Amendment does not apply. " 'Historically, this guarantee of due process has been applied to *deliberate* decisions of government officials to deprive their person of life, liberty, or property.' " *Collins*, 503 U.S. at 127, n. 10, quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986) (emphasis in original). A line must be drawn distinguishing traditional torts from substantive due process violations, and this Court has instructed that the line-drawing in this area should be done with judicial self-restraint:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisonmaking in this uncharted area are scarce and open-ended. [Citation omitted.] The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins, 503 U.S. at 125. Thus, because this case does not involve a deliberate decision of Deputy Smith to deprive Mr. Lewis of his life, the Fourteenth Amendment is not implicated in the first instance.

Finally, there is no need to extend the Due Process Clause to the facts herein. This type of case, that is, an automobile accident, is routinely adequately addressed in the state tort context. There is simply no compelling reason for this Court to extend the reach of the Due Process Clause into areas best left to state or local control.

Thus, the claim under the Fourteenth Amendment should not be recognized.

2. If the Fourteenth Amendment is Implicated, Only Conduct that Shocks the Conscience May Establish a Deprivation

However, assuming for the sake of argument that the Fourteenth Amendment is implicated, only conduct which shocks the conscience establishes a viable claim under this Amendment. This is the majority view in chase cases:

> The majority view of the minimum threshold in cases like this [a police chase case] is correct. Accordingly, we hold that police officers' deliberate indifference to a victim's rights, standing alone, is not a sufficient predicate for a substantive due process claim in a police pursuit case. Rather, in such a case, the plaintiff must also show that the officers' conduct shocks the conscience.

See Evans v. Avery, 100 F.3d 1033, 1037-38 (1st Cir. 1996). *See also Hill v. Shobe*, 93 F.3d at 421 (adopting "criminal recklessness" as the standard in emergency-run cases; affirming dismissal of a case which alleged mere civil recklessness).

> [I]t is particularly appropriate to measure police pursuits in that way. Police chases are not only a necessary concomitant of maintaining order in our modern society, but they are also inherently hazardous. By their very nature, they inevitably create some risk of injury to bystanders. Officers must decide the balance between law enforcement and risk to public safety quickly and while

> under considerable pressure. In such circumstances, permitting the Due Process Clause to serve as a surrogate for state tort law would hamstring the police in their performance of vital duties.

Evans, 100 F.3d at 1038. Hence the reason for the exceptionally high standard. Anytime an officer is involved in a police chase or in an emergency run (for instance, speeding to the scene of a crime), he or she is involved in a dangerous activity because such driving inevitably involves violation of the normal rules of the road. However, every State allows its officers to violate the rules of the road under emergency circumstances.

If this Court were to adopt a lower standard such as recklessness or deliberate indifference,[3] this would be too low of a threshold (because of the inherent dangerousness involved in all emergency runs). Anytime an officer violates the rules of the road, there is always an argument that he acted recklessly which, under a typical set of facts, would be the same as saying that he was deliberately indifferent; indeed, any chase is a deliberate action by the officer and, given the fact that the officer is aware of the inherent risks in a chase, an injured party could always in good faith claim that the officer was indifferent to the risk anytime an injury actually resulted. In short, if this Court were to adopt any standard lower than a shocks-the-conscience standard, then, given the inherent

[3] At least one commentator has found that "there appears to be no discernable difference between indifference, recklessness, wantonness and wilfulness. . . . " *Kritchevsky, Making Sense of State of Mind*, 60 Geo. Wash. L. Rev. 417, 470 n. 279 (1992).

risks involved in any high-speed run, the ultimate claim for all practical purposes would amount to nothing more than the officer's mistake in judgment.

Nor is this merely a matter of artful pleading simply because the inherent risks in a high-speed pursuit arguably encompass true reckless conduct, no matter how well-trained the officer might be. Although lower courts could correctly recharacterize the facts, *see Medina v. City and County of Denver*, 960 F.2d 1493, 1500 (10th Cir. 1992) (recharacterizing a police expert's conclusion that the City's pursuit policy demonstrated deliberate indifference when, in fact, the facts only supported a claim of negligence); and *Apodaca v. Rio Arriba County Sheriff's Department*, 905 F.2d 1445, 1446 n. 3 (10th Cir. 1990) (recharacterizing an officer's driving conduct as negligent rather than as reckless and wanton as was plead), such judicial tinkering after litigation has been filed does nothing to outline for the officer on the street what is and what is not permissible under the Constitution.

III. CONCLUSION

In conclusion, *amicus* respectfully requests that this Court reverse the opinion of the Ninth Circuit and hold that police vehicle-involved automobile accidents, where the police vehicle is not intentionally used as an instrumentality of force, does not implicate either the Fourth or the Fourteenth Amendment. In the alternative, if this Court finds a constitutional implication, amicus respectfully requests that this Court establish a shocks-the-conscience standard in order to create a Fourteenth Amendment deprivation under the facts at hand.

Respectfully submitted,

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